KOH LEE BENG & ANOR. v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Tan Ah Tah and Winslow JJ.) May 4, 1970]

[Singapore — Federal Court Criminal Appeal No. Y. 20 of 1969]

Criminal Law and Procedure — Sentence — Racial violence — Penal Code, s. 324.

Penal Code, s. 324 — Voluntarily causing hurt with a dangerous weapon — Racial hostility — Maximum sentence.

The accused had been convicted for attempting to murder one Azman bin Yahaya while with another accomplice during a period of racial tension. Azman was said to have been stabbed by the first appellant while being held by the other two men in the Jalan Kayu area at about 11 a.m. on June 13, 1969. The accused were sentenced to 10 years imprisonment. On appeal it was argued that the learned trial judge had erred in law in holding that the appellants had the intention to kill their victim.

Held: (1) the evidence in this case fell short of establishing an intention to commit murder and therefore the conviction under section 307 of the Penal Code cannot stand;

(2) the evidence did not show that the injury to the victim was such that that his life was ever in danger and therefore the accused could not be convicted of causing grievous hurt with a dangerous weapon but only of voluntarily causing hurt with a dangerous weapon;

(3) whatever the situation in the country may be, no one who causes physical injury to someone else motivated or actuated solely by racial hostility, if he is convicted and the facts bear out such motive, can expect to be dealt with other than with the utmost severity and unless there are mitigating circumstances he can expect to be sentenced or punished to the maximum allowed by the law and therefore in this case where there were no mitigating circumstances the accused must be sentenced to three years imprisonment and three strokes of the rattan each.

COURT OF CRIMINAL APPEAL.

S. K. Lee for the appellants.

K. S. Rajah (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (delivering oral judgment): I think we have indicated during the hearing of this appeal our view on whether the conviction of the two appellants under section 307 of the Penal Code can stand. It is in our judgment clear that the evidence falls short of establishing an intention to commit murder and that being so this conviction cannot stand. Neither can it be said on the evidence that the offence which was committed by the two appellants together with their third companion was such that it amounted to an offence under section 326 of the Penal Code, that is causing grievous hurt with a dangerous weapon Unfortunately section 320 of the Code has defined grievous hurt as, among other things, any hurt which endangers life. It is submitted that on the evidence the medical evidence would support the finding that the victim's life was in danger but we think it is clear on the evidence that at no stage was there any evidence to suggest that the injury to the victim was such that his life was ever in danger. That may be fortunate for the appellants so that we are left with only one offence which is disclosed by the evidence and that is the offence of voluntarily causing hurt by a dangerous weapon namely an offence under section 324 of the Penal Code.

Bearing in mind that this offence was committed at the time when the racial disturbances which overflowed into Singapore were at its height, we must, as did the trial judge, take an extremely serious view. Whatever the situation in the country may be, no one who causes physical injury to someone else motivated or actuated purely by racial hostility, if he is convicted and the facts bear out such a motive, can expect to be dealt with other than with the utmost severity and unless there are any mitigating circumstances he can expect to be sentenced or punished to the maximum extent allowed by the law so that in this particular case where there are no mitigating circumstances at all we in setting aside their conviction under section 307 and the sentence imposed for that conviction substitute a conviction under section 324 and impose the maximum sentence we can impose of imprisonment for a term of three years to commence from the date of their conviction in the trial court and it is, having regard to the circumstances, a proper case where each of them will also be punished besides a term of imprisonment to undergo caning and each of them will be punished with three strokes of the cane besides the term of imprisonment.

Order accordingly.

Solicitors: *S. K. Lee & Co.*

SHAMSUDIN v. VIJEYACONE

[O.C.J. (Chua J.) November 8, 1969]

[Singapore — Suit No. 486 of 1969]

Moneylenders — Whether person a moneylender — Presumption — Burden on defendant to show he is not a moneylender — Unlawful transaction — Effect of — Moneylenders Ordinance, 1959, s. 3.

The plaintiff sought a declaration that a mortgage of property by him to the defendant was null and void on the ground that the defendant was at the material time carrying on the business of moneylending and had no licence to do so.

Held: in the circumstances of this case the evidence showed that there was some degree of system and continuity in the defendant's moneylending transactions and therefore it was more probable than not that the defendant was carrying on the business of moneylending. As he did not have a licence to carry on the business of moneylending the transaction between him and the plaintiff was therefore unlawful and void and could confer no rights.

Case referred to:-

(1) *Cornelius* v. *Phillips*, [1918] 1 A.C. 199.

CIVIL SUIT.

G. Raman for the plaintiff.

J. B. Jeyaretnam (*S. Gunaratnam* with him) for the defendant.

Chua J.: The plaintiff's evidence was briefly this. Sometime in September, 1966, he needed $2,000 for his business. He told his friend Yahaya bin Haji Mohamed Ghouse of it. Yahaya told him that his

friend Gafoor bin Sheik Jaafar could arrange it. A few days later Yahaya, Gafoor and the defendant came to his office. Yahaya introduced him to Gafoor and the defendant. The defendant agreed to lend $2,000 on an I.O.U. with interest at $200 p.m. He signed an I.O.U. for $2,000 and the defendant gave him $1.600 cash after deducting two months' interest.

Six months later he needed some more money for his business but found it difficult to pay the high rate of interest charged by the defendant. He spoke to the defendant who agreed to lend a further sum of $6,000 at 12% interest p.a. on a security of a second mortgage of his house No. 111-A Lorong H. Telok Kurau Road. It was agreed that the sum owing on the I.O.U. would be deducted from the $6,000. A second mortgage of the house for $6,000 was executed by him on the 24th February, 1967. The defendant told him that after deducting what was due on the I.O.U. for principal and interest and for solicitors' fees and expenses from the $6,000 there was a sum of $2,400 remaining which the defendant gave him in cash. He paid interest of $60 p.m. to the defendant.

Sometime in December, 1968, the defendant said that he wanted interest of 24% p.a. from February, 1969. He told the defendant he could not pay the higher rate of interest. He then received a solicitor's notice dated the 30th December, 1968, from the defendant demanding payment of the principal sum due on the mortgage and all interest due thereon and saying that if he should make default in such payment at the expiration of thirty days after service of the notice on him the defendant would immediately thereafter proceed to sell the mortgaged property in pursuance and exercise of the power for this purpose given to the defendant by the mortgage.

He then went to see the defendant and asked the defendant not to take action and said that he would pay off the mortgage. He then consulted solicitors and correspondence passed between his solicitors and the defendant's solicitors as to the amount of interest due. On the 1st March, 1969, the defendant's solicitors wrote saying that the property would be put up for auction on the 11th March, 1969. On the 10th March, 1969, his solicitors wrote to the defendant's solicitors stating that the defendant was a moneylender within the meaning of the Moneylenders Ordinance, 1959, and that the mortgage was not in accordance with the Ordinance and was void and that the plaintiff would apply to the court to set aside the mortgage and requesting the defendant to withdraw the sale. On the 11th March, 1969, he commenced the present proceedings. On the same day the mortgaged property was sold by public auction for $30,000. On the 17th March, 1969, on his application a *lis pendens* order was made by the court.

The plaintiff claimed:

"(1) for declaration that the deed of second statutory mortgage dated the 24th February, 1967, and deposited in Volume No. 1638 No. 193 in respect of the property Lot 1304 Mukim XXVI Siglap and erected building thereon known as house No. 111-A Lorong H, Telok Kurau, Singapore, 15, is null and void.

(2) cancellation and delivery up of the said second statutory mortgage deed.

(3) declaration that the plaintiff is entitled to the same mortgaged property discharged from all claim under the said alleged second statutory mortgage."

The plaintiff's main contention in this case was that the defendant was at the material time carrying on a business of moneylending.

Evidence was adduced by the plaintiff (by calling Gafoor and Yahaya) that the defendant had lent money on interest to three persons and to Yahaya on the recommendation of Gafoor. Yahaya's evidence was that he signed an I.O.U. for $2,000 and paid the defendant $20 p.m. interest. A year later the defendant requested a mortgage. He mortgaged his property to the defendant for $2,000 with interest at 12% p.a. and the defendant returned the I.O.U. He had not yet paid off the mortgage.

The plaintiff also adduced evidence that on the 15th April, 1969, officers of the Corrupt Practices Investigation Bureau searched the house of the defendant and found among other things several I.O.U. chits, a list of names with sums of money against each name, cheques, some made to cash and some made to "V. Vimalacone" and other documents. Altogether eighteen documents and nine cheques were produced in court. The plaintiff maintained that these documents and cheques were in respect of the moneylending business of the defendant.

Section 3 of the Moneylenders Ordinance, 1959, provides:

"... any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

The onus was therefore on the defendant to show that he was not a moneylender within the meaning of the Ordinance.

The burden of proof that was cast upon the defendant was a persuasive burden and such burden would be discharged by evidence satisfying the court of the probability of that which the defendant was called upon to establish.

The evidence of the defendant was shortly this. He was senior interpreter of the courts until he retired a few months before September, 1966. In September, 1966, he was re-employed as an interpreter and is at present attached to the Criminal District and Magistrate's Courts.

He first met the plaintiff four or five years ago and later they became friends. Sometime in January, 1967, the plaintiff requested him for a loan. The plaintiff at first wanted to borrow $10,000 and said that he would mortgage his property. He inspected the plaintiff's property and agreed to lend $6,000 at 12% interest. The plaintiff wanted money urgently and asked for $3,000 straight-away but he advanced the plaintiff $2,500 and the plaintiff signed an I.O.U. A few days later the plaintiff again asked for a further advance and he gave the plaintiff $250 and the plaintiff signed another I.O.U.

A firm of solicitors was instructed to prepare the second mortgage for $6,000 with interest at 12% p.a. On the 22nd February, 1967, he deposited with the

solicitors $3,250 being the balance of $6,000 after deducting the $2,500 and the $250. The second mortgage was executed by the plaintiff on the 24th February, 1967, at the solicitors' office. After deducting the costs of the solicitors and the disbursements a cheque for $3,072 was given by the solicitors to the plaintiff and he returned the I.O.Us. to the plaintiff.

On the 11th June, 1968, the plaintiff gave notice that he was ready to pay off the mortgage and asked for the title deeds. He forwarded the title deeds the following day and at the same time informed the plaintiff of the sum due for principal and interest. Nothing further was heard from the plaintiff and reminders were sent to the plaintiff. On the 10th December, 1968, the plaintiff returned the title deeds but said nothing about the redemption of the mortgage.

On the 30th December, 1968, he gave notice to the plaintiff to pay up the mortgage otherwise the mortgaged property would be put up for sale. The plaintiff then replied that he had paid up all the interest. Correspondence then passed between the parties as to the interest due. On the 11th March, 1969, the mortgaged property was sold by public auction for $30,000.

He did not at any time carry on a business of moneylending. He had never advertised or held himself out as a moneylender. He had, however, lent to quite a number of friends and relatives without interest. He had never lent money to perfect strangers. He had, however, lent $2,000 on interest to Yahaya on a security of a mortgage. He had also lent $3,000 on interest to an Indian whose name he could not remember, in 1967, on security of a mortgage. He had lent money to about two dozen people, the loans ranging from $1 up to $6,000. The loans up to $1,500 were without interest. He had lent money on mortgage on three occasions only. Gafoor was not a friend of his but he had seen him off and on.

Of the documents seized by the C.P.I.B. and produced in court only six belonged to him namely Exhibits P1AA, P1AC, P1AD, P1AE, P1AF and P1AG.

How did these documents come to be in his possession? The defendant's explanation was this.

Ex. P1AA reads:

"Yahaya brother-in-law of Ishak bin Karim School Servant Opera Estate School. Introducer Mr. Gafoor of Iyoup & Co.".

The defendant said that this document was in his handwriting. He explained how he came to write it. He said:

"One day Gafoor met me on the street and he said he encountered some trouble when he took goods to India and he also said that this man Yahaya who is the brother-in-law of Ishak bin Karim encountered a bigger trouble when he went to India and all Yahaya's goods were confiscated. I knew this man Yahaya so I wrote this down and I kept it away."

When he was questioned why he wrote "Introducer Mr. Gafoor" he replied "It was Gafoor who told me all about this Yahaya".

Ex. P1AC is an I.O.U. for $20 dated 10th June 1969. The defendant said that he lent $20 to Cheng Chu Soon who signed the I.O.U. and gave it to him. This loan had not yet been repaid.

Ex. P1AD reads: "Received $350 from Mr. Vijeyacone" and signed "P. E. Ponniah" and dated 22nd April 1963. The defendant said that this was a receipt given to him by Ponniah. He lost a sum of $350 at poker to Ponniah and when he paid the $350 Ponniah gave him this receipt.

Ex. P1AE reads "Received $300" and signed "P. E. Ponniah" and dated 10th August 1963. The defendant said that this was also a receipt given to him by Ponniah. He lost a sum of $300 at poker to Ponniah and when he paid the $300 to Ponniah the latter gave him this receipt.

Ex. P1AF reads:

"Sd. Hamid Maricar
s/o Ahamed Maricar
I.C. S2C No. 02158
96 Lorong Engku Aman

7/8/1965."

The defendant said that Ex. P1AF contained an address but said nothing more about it.

Ex. P1AG is an I.O.U. for $1,000 signed "Teo Ee Cheok" and dated 10th May 1967. The defendant did not say anything about this but it is clearly a loan made by the defendant to Teo Ee Cheok.

I was of the view that the story of the defendant regarding Ex. P1AA was a highly improbable story. It appeared to me that the probabilities were that this man Yahaya was introduced to the defendant by Gafoor for a loan. Gafoor in his evidence had said that he had recommended people to the defendant for loans.

As regards Exhibits P1AD and P1AE I was of the view that it was more probable that these two documents were given by Ponniah to the defendant for loans which the defendant had made to Ponniah than that they were receipts given by Ponniah to defendant. It is more likely that a person who lost in gambling would sign an acknowledgment of his loss rather than the winner giving a receipt to the loser when the loser paid up.

The defendant called his son V. Vimalacone to give evidence. Vimalacone's evidence was shortly this. He lived with his father, he is 28 years old a bachelor and is an overseer in the Housing & Development Board drawing $400 to $450 p.m. salary and allowance. He indulged in gambling. He gambled with his colleagues and with others. He said that of the documents seized by the C.P.I.B. and produced in court the following documents belonged to him — Exhibits P1AB, P1AJ, P1AH, the eight I.O.Us. in the bundle Ex. P1A, the two I.O.Us. Ex. P1B and the nine cheques in bundle Ex. P2. He explained how he came to be in possession of these documents.

Ex. P1AB is a piece of paper containing 25 names with sums of money against each name. The sums ranging from $8 to $650. Vimalacone said that the list was written by him and that it was a list showing the persons to whom he had lost money in gambling and persons who had lost to him in gambling except

for three persons — Ong Toon Chew (No. 8 on the list), Edmund Lee (No. 17 on the list) and David (No. 18 on the list). The $200 against the name of Ong Toon Chew was a loan to Ong Toon Chew by him. The $8 against the name of Edmund Lee and the $16 against the name of David were for dance coupons which he had sold to these two persons. He said he owed money to Nos. 1 to 12 excluding No. 8 on the list and that Nos. 13 to 26, excluding Nos. 17 and 18, owed money to him.

Ex. P1AJ and Ex. P1AH are two I.O.U. chits for $272 dated 23rd January 1969 and for $215 dated 13th December 1968 respectively. Vimalacone said that these two I.O.Us. were signed by John Ong Tat Seng for money which John Ong Tat Seng had lost to him in gambling.

Now, John Ong Tat Seng was called to give evidence and he confirmed that Ex. P1AJ and P1AH were signed by him and that they were given for monies due by him to Vimalacone for gambling.

The bundle Ex. P1A consists of eight I.O.Us. and Ex. P1B consists of two I.O.Us. Vimalacone said that all these I.O.Us. were given to him by friends who had lost money to him in gambling. He drew the court's attention to one I.O.U. in Ex. P1A which reads: I owe you $100 on the 17th March 1969 due to bad luck O.K."

I now come to the bundle of nine cheques Ex. P2. Vimalacone said this about these cheques:

"I have a friend Victor Goh who last year sometime round about October wanted some money from me in the region of $1,700. I gave him cash $1,700 and later asked him for security. A week later he gave me seven cheques some bearing my name and some in cash. Just prior to his leaving for the Federation in December he gave me another cheque. The total value of these cheques was $1,700. He went to the Federation on business trip and said he would return soon and repay me the whole amount. Somewhere in mid-January this year he returned and gave me $300. He left for the Federation again towards the end of the month. Prior to leaving he said that he would repay the whole sum when he returned the following month in February. However he was not able to come back to Singapore in February and only returned in latter part of April this year and paid me the whole sum. He asked me for the return of those cheques but I told him they were in the hands of the C.P.I.B. He wanted me to hand back the cheques to him as soon as possible.

This cheque S. 175197 was given to me by somebody else, a friend who lost in gambling."

According to Vimalacone he held 12 I.O.U. chits totalling $1,763 and one cheque for $220 in respect of gambling debts. I did not think that Vimalacone, who is only an overseer drawing a salary and allowances amounting to $400 and $450 p.m., was such a heavy gambler as he claimed to be. John Ong Tat Seng is only a hawker's liaison officer and I was of the view that it was highly improbable that he would gamble and lose sums of $272 and $215. It appeared to me to be most probable that these I.O.Us. and the cheque were given by these people for loans that were made to them and that the list Ex. P1AB was a list of persons to whom money had been lent.

Vimalacone's story that the eight cheques totalling $1,700 were given to him by Victor Goh was in my view highly improbable. It appeared to me most probable that these cheques were given by the persons who drew the cheques for loans which were made to them.

It was clear that Vimalacone was in no position to make these loans.

Ex. P1AK was not claimed by the defendant or his son. It is a list showing eleven dates and sums of money against each date. The dates are from 30th April 1968 to 26th December 1968 and the sums range from $110 to $220. This document was found together with the I.O.Us. Ex. P1A in a cabinet in the dining room.

I was of the view that it was most probable that the documents seized from the defendant's house and produced in court related to the moneylending transactions of the defendant.

There was sufficient evidence to show that there was some degree of system and continuity in the defendant's moneylending transactions. On the evidence adduced before me I was of the opinion that it was more probable than not that the defendant was carrying on a business of moneylending at the time he made the loan to the plaintiff and the defendant had therefore not discharged the onus that was on him.

It was not disputed that the defendant did not hold a licence to carry on a moneylending business.

It was submitted on behalf of the defendant that even if the defendant was an unlicensed moneylender, by section 15 of the Ordinance the transaction between the defendant and the plaintiff was not void but merely unenforceable. I did not agree with that submission.

By section 8 of the Ordinance it is an offence to carry on a business of moneylending without a licence. Consequently the moneylending transaction between the parties in this case is unlawful and void and can confer no rights and is not merely unenforceable: (See *Cornelius* v. *Phillips*[1]).

For these reasons I gave judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: *M. P. D. Nair; S. Gunaratnam & Co.*

LIOW ENG GIAP v. PUBLIC PROSECUTOR

[A.Cr.J. (Choor Singh J.) May 15, 1970]

[Singapore — Magistrate's Appeal No. 242 of 1969]

Criminal Law and Procedure — Sentence — Matters to be taken into consideration in imposing fine.

The appellant had been convicted of dishonestly retaining stolen property and sentenced to 6 months imprisonment. In earlier proceedings the person who stole the tractor engine, the subject of the charge, had been convicted and sentenced to 6 months imprisonment and the person who sold the engine to the appellant had been convicted of assisting in the disposal of stolen property and fined $1,000.

Held: in the circumstances of this case and in view of the sentence on the first "receiver", the sentence should be altered to a fine of $2,000 or 6 months imprisonment.